

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOEL O'BRYANT,
Appellant,

v.

STATES STEAMSHIP COMPANY,
a Corporation,
Appellee.

Brief for Appellee States Steamship Company

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No. 5920

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STATEMENT OF FACTS

This brief will be short, for there are no points of law to be discussed, and the facts are plain. A single reading of the testimony will, I am sure, convince the Court of the propriety of Judge Kerrigan's order dismissing the libel. And any extended discussion of the facts is therefore unnecessary.

The libelant claims he was hurt by falling down a ladder leading from the officers' deck to the well deck on the steamer "Pennsylvania" while on a return voyage from the Orient, on October 4, 1928. He blames his accident on the fact that the starboard handrail of the ladder had at the time been temporarily repaired in what he claims was an improper manner.

The truth appears to be that instead of falling down the ladder, he was injured in a drunken brawl with one or more members of the crew. The libelant was second assistant engineer. On the outward voyage to the Orient he appears to have behaved himself properly enough. But once in the Orient where liquor was available, he became a drunken, dissolute, quarrelsome, disobedient, half crazed renegade on the ship. He was drunk over considerable periods, was drunk while on duty, often so drunk that the chief engineer did not think it safe to permit him to go on duty and stood his watch himself in his place. He had frequent altercations and quarrels with various members of the crew, and they appear, as far as possible, to have avoided him and left him alone. He carried a gas pipe into the messroom and sat with it across his knees at table, a circumstance which he attempts to give an innocent explanation to but which his fellow officers construed as a threat against them, and the evidence seems fully to justify their fears. He actually was so regardless of the safety of the ship that he left his place of duty in the engine room and abandoned it while the ship was maneuvering under bells in the river at Shanghai. Practically the whole licensed personnel of the ship has testified against him to the foregoing facts,—a circumstance somewhat unique in these cases, in so many of which the men testify for each other, and the ship owner has often difficulty in presenting his case. The testimony of the officers who have testified against him is of course denied in large part by the

libelant, but considering his self interest in the case, the facts that he has himself been forced to admit are strong corroboration of the case against him. He has admitted deliberate disobedience on his part, of the captain's orders that he remain away from the crew's quarters aft (O'Bryant deposition, 35,76) ;and has admitted that he refused to obey the orders of his immediate superior, the chief engineer, in regard to certain duties in the engine room (O'Bryant deposition, 66). He has admitted consorting with lewd Oriental women aboard the ship and contracting venereal disease from them.

He was hurt in the evening. In defiance of the captain's orders he had gone aft to the crew's quarters. The captain and chief engineer had gone there to order him forward. They found him drinking with the crew, and drunk, and after sending him forward, remained to search the crew's quarters for vodka. O'Bryant went staggering forward, unsteady in his gait. Shortly afterwards the first assistant engineer, Lucas, and the chief steward, Shorts, heard a fight and a scuffle and blows being struck and drunken curses on the officers' deck near the *top* of the ladder down which O'Bryant later claimed to have fallen. Lucas was at this time in the bath room. Shorts was in his own cabin. They didn't go out or attempt to interfere because O'Bryant was so thoroughly disliked on the ship that nobody cared whether he got beaten up or not. Shortly afterwards O'Bryant was found lying on the deck with his head in a small pool

of blood, six or eight feet away from the *top* of the ladder down which he says he fell.

The captain and the chief engineer came forward from the crew's quarters, the first assistant was also there, and after some objection on the part of the first assistant to touch O'Bryant at all, he and another man carried O'Bryant to his stateroom. O'Bryant was raving. The third officer, who was the man on board most versed in first aid remedies, attended to him, and washed and bandaged a cut on his head and put him to bed.

O'Bryant's own explanation of the accident is that he was sober when ordered forward by the captain from the crew's quarters. But after going to his room he remembered some clothes he had in a bucket in the bathroom which he wanted to wash, that he took that bucket and started down the ladder to get some boiler compound which he was going to use as a substitute for soap and which was kept on the deck below about ten or fifteen feet from the foot of the ladder, that he went down the ladder backwards, carrying the bucket in his left hand, and that his right hand slipped off the rail of the ladder due to its alleged defect, that he fell to the deck below, climbed up the ladder again and fell on the deck near the top of the ladder where he was found, lost consciousness and knew nothing until six o'clock next morning. That is his story. The ladder, we may add, was one of those slanting, half stairway—half ladder kind of affairs, made of iron and with a handrail on each side—the type so common on ships.

We ask the Court particularly to read at least the direct examinations of Captain Linnander, Chief Engineer Millich, First Assistant Engineer Lucas, Third Officer Joyce, Second Officer McCarty, Third Assistant Chuinard, Carpenter Sandberg and Chief Steward Shorts. We are convinced a single perusal of that testimony will dispose of the case and dispense with any necessity for extended argument on our part. Either the whole ship's company are egregious liars, or else O'Bryant is. And the weight of evidence is clearly with the ship's company. Judge Kerrigan, possibly because he did not want to stigmatize O'Bryant by describing him as he would have had to describe him had he written an opinion, dismissed the libel without opinion.

We may observe that even if O'Bryant's very improbable story be accepted as true, he could not recover anything in this case because the repair to the ladder was reasonably safe, it was perfectly obvious, and had been used by the whole crew frequently for days preceding this, and O'Bryant certainly knew, or at least ought to have known, exactly what it was like. The bathroom, which he says he used every day, was within fifteen feet of the head of this ladder, and the boiler compound which the engineers (and he was one of them) were using every twenty-four hours, was within ten or fifteen feet of the foot of the ladder. So that O'Bryant must have seen the ladder often every day, and probably often used it. He does not deny using it. He merely says he cannot recall. Ships at sea of course frequently have to make tem-

porary repairs. The risk of such is one of the ordinary risks a seaman assumes. There is not the slightest evidence that this repair was in any way negligent. But even if it was, he would have assumed the risk of it when it was open and apparent and obvious to him. I do not know what more the ship could have done for him, unless it had hung a red lantern on the ladder, or kept him locked up in his stateroom as unfit to be about the ship at all.

O'Bryant sued for \$50,000.00. There is nothing small about him. The substance of the medical testimony was that his only injuries were a fracture of the spinal processes of the sixth and seventh cervical vertebrae. The spinal processes, as your Honors know, are the little bony spurs that project from the vertebrae. The fracture of them is not serious, and O'Bryant completely recovered.

He also included in his complaint a claim for \$11.00 wages wrongfully, as he claims, deducted from him when he was paid off at San Francisco. And he also claims wages from San Francisco to Portland, Oregon. The fact is that he was paid off before the United States Shipping Commissioner and signed a release before the Commissioner in the usual way. He was paid off by mutual consent because he wanted to go to the hospital in San Francisco.

At the trial his proctor asked leave to amend the libel by including a third claim, namely, damages for maltreatment by the captain in forcing O'Bryant to go back to work after his injury. This claim is that O'Bryant was forced to return to the performance of

his duties about two days after his injury under threat of stopping his pay if he did not so go back to work, and that the captain should have known that going back to work would aggravate the injuries. We observe here, parenthically, that there was no force used to make him go back to work—merely a warning that if he did not, his wages would be stopped. This, in any light, is hardly maltreatment. This amendment was requested long after the ship's depositions were taken, and of course the ship had no opportunity to meet it by testimony. The request was only made at the opening of the trial. After first objecting, we ultimately consented to the allowance of the amendment, feeling that if we did not do so, libelant's proctor might at some subsequent time file a new and different libel on this claim as a new and separate cause of action. We do not know whether he could have or not, but rather than run that risk, we consented to the amendment. We did this because we felt that the claim practically refuted itself. To hold the ship owner responsible for any such thing as that, it would have to appear that the captain knew, or as a reasonable man should have known, that these spinal processes on the vertebrae were broken, and that it would injure O'Bryant to return to work. The doctors, however, have testified that his returning to the performance of his duties did not prevent his permanent recovery, though it may have caused him some pain. And as to the other phase of it, it must be obvious to this Court that an ordinary sea captain could hardly be expected to diagnose

O'Bryant's case and decide that he should not go back to work when it took expert doctors and X-rays in San Francisco to determine that anything was the matter with O'Bryant at all. O'Bryant's conduct had fully justified the captain in believing, which was the fact, that he was a rebellious member of the crew, unwilling to perform his duties, and using the accident as an excuse for not doing so.

Respectfully submitted,

ERSKINE WOOD,

Proctor for Appellee.